



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: U. S. Constructors, Inc.

File: B-282776

Date: July 21, 1999

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GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation provided for award on the basis of initial proposals without conducting discussions and expressly required offerors to furnish with their initial proposals three completed past performance reference questionnaires, agency reasonably determined not to communicate with the protester regarding its performance history where the protester failed to provide completed questionnaires in its initial proposal.

DECISION

U.S. Constructors, Inc. (USC) protests the award of a contract to Dover Elevator Company under request for proposals (RFP) No. GS-07P-99-UWC-0005, issued by the General Services Administration for elevator modernization at the Federal Building/Courthouse, Tyler, Texas. USC challenges the agency's decision not to communicate with it concerning its performance history.

We deny the protest.

The RFP contemplated the award of a fixed-price contract to the offeror whose proposal was most advantageous to the government, technical evaluation factors and price considered. RFP at 1. The RFP included the following technical evaluation factors: (1) experience and past performance; (2) number of similar/comparable projects completed; (3) quality of references; and (4) percentage of work to be performed by offeror. *Id.* at 5-6. The experience and past performance factor was weighted at 40 percent and the other three factors were each weighted at 20 percent. Each technical evaluation factor could receive a maximum raw score of 7 points, which then would be multiplied by the assigned factor weight. Under this evaluation

scheme, an offeror's proposal could receive a maximum technical score of 700 points. Id. The RFP advised that award could be made without discussions. Id. at 1.

As relevant here, the RFP advised that prior to the submission of proposals, offerors were responsible for obtaining past performance and experience information for similar/comparable projects performed. Id. at 4. The RFP instructed that past performance and experience questionnaires, copies of which were included in the solicitation package, were to be completed by references and submitted to the offeror in sealed envelopes; the offeror was required to submit the sealed envelopes with its technical proposal. Id. The agency's evaluation of proposals for technical evaluation factors 1 through 3 would be dependent upon information provided by the references. Contracting Officer's (CO) Statement at 3. For example, for the experience and past performance factor, the agency would review the references to determine whether an offeror's performance on the majority of similar contracts was satisfactory or better, and whether the majority of contract references indicated that they would contract with the offeror again for the same services. RFP at 5. Similarly, the agency would review the references for the similarity/comparability of three projects completed within the past 5 years and to ensure that reference data was concurrent with information provided in the offeror's technical proposal. Id.

Four firms, including USC and Dover, submitted initial proposals by the closing time on May 7, 1999. Only Dover submitted completed reference questionnaires in accordance with the terms of the RFP. Dover received one "excellent" and two "very good" ratings from its references. Agency Report, Tab 6C, at 1-3. In addition, two references commented that "[Dover] is very professional in [its] approach to this type work," and "[t]he ability to conform to the building schedules and the willingness to perform made Dover the clear choice for this project. Follow up to date has been great." Id. at 1-2.

In contrast, USC listed its references, including a brief description of the project and work performed, but told the agency that "[y]ou can check with them [*i.e.*, the references]." Agency Report, Tab 5A, USC Technical Proposal Cover Letter, May 6, 1999. USC stated that all of its projects in the last few years were government jobs, and "[the government references] will only give a rating to another government agency." Id. Although not required by the solicitation to do so, the contracting officer called USC's three listed references. The first reference from a Veterans Affairs medical center rated USC "poor," stating "Scheduling: poor compliance with contract schedule. Project Management: poor-do[es] not adhere to contract requirements-difficult to manage contractor" Agency Report, Tab 5C, at 1-2. The contracting officer left a message for the second reference at the Naval Air Station in Corpus Christi, Texas; this reference did not return the call prior to award. Id. at 4. Finally, the contracting officer reported that the telephone service message twice indicated that the telephone number for the third reference was no longer a working number, and the contracting officer, therefore, was unable to speak to, or to leave a message for, this reference. Id. at 6.

The agency determined that USC appeared to have similar/comparable experience in elevator work, but noted that not only did USC fail to submit completed past performance reference questionnaires, but the only reference responding to the contracting officer on USC's behalf reported the firm's performance was poor in the areas of compliance with contract schedule and contract requirements. Agency Report, Tab 10, Source Selection Evaluation Board Final Report and Source Selection Decision, at 2. Accordingly, while USC's proposal, which received a total score of 400 points, was given maximum credit for the similar/comparable projects evaluation factor, it was downgraded for the experience and past performance factor and it received no credit for the quality of references factor. Id. at 2-3. On the other hand, Dover's proposal received maximum credit for each technical evaluation factor, for a total score of 700 points, as Dover submitted completed reference questionnaires which demonstrated the firm's excellent or very good experience and past performance, the firm's completion of similar/comparable projects, and the references' familiarity and satisfaction with Dover's work. Id. at 3-4.

Despite the fact that USC submitted the low priced proposal, its price being approximately 8 percent (\$29,954) lower than Dover's second-low priced proposal, CO Statement at 5, the agency did not consider USC's proposal for award because the firm failed to submit completed past performance reference questionnaires and the limited information available to the contracting officer prior to award indicated poor performance by USC. Agency Report, Tab 10, at 5. On May 14, the agency awarded a contract without discussions to Dover, which submitted a technically superior proposal. (The agency made its tradeoff decision between Dover and Offeror A, a firm whose third-low priced proposal received 560 points.) Id. at 3-5.¹

USC, which does not meaningfully challenge the underlying evaluation of its proposal,² complains that the contracting officer abused her discretion by not affording the firm an opportunity to address its past performance history prior to the agency's award on the basis of initial proposals.

Federal Acquisition Regulation (FAR) § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that "[i]f award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not

¹Only after award, on May 26, did USC's second reference indicate to the contracting officer that USC did "good work." Agency Report, Tab 5C, at 4.

²We have no basis to object to the agency's decision to assign no credit to USC's proposal for the quality of references evaluation factor since the firm did not return any completed questionnaires with its initial proposal and the limited information available to the contracting officer prior to award reflected poor past performance for USC.

previously had an opportunity to respond).” Pursuant to this provision, a contracting officer has broad discretion to decide whether to communicate with a firm concerning its performance history. We will review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement. Rohmann Servs., Inc., B-280154.2, Nov. 16, 1998, 98-2 CPD ¶ 134 at 8-9.

Applying this standard to the circumstances of this procurement, we believe the contracting officer reasonably exercised her discretion in deciding not to communicate with USC concerning its performance history. In this regard, USC does not dispute that it failed to comply with the RFP requirement to submit completed past performance reference questionnaires in its initial proposal. USC also does not dispute that the contracting officer did more than was required by the terms of the solicitation by calling each of the firm’s listed references. The record shows that the contracting officer reached one reference, who reported poor schedule compliance and project management for USC; she left a message for another USC reference that went unanswered prior to award; and she was unable to reach the last reference because the phone number provided by USC for this individual was no longer a working number. On this record, we think that in the first instance, it was incumbent upon USC to comply with the RFP requirement to furnish completed past performance reference questionnaires in its initial proposal before it could credibly argue that it was entitled to communications regarding its performance history.

Where an offeror like USC fails to satisfy its burden to submit a proposal adequate for evaluation, and where the offeror is on notice that the agency intends to make award based on initial proposals without discussions, we have no basis to object to a contracting officer’s decision not to communicate with the firm regarding its performance history. See, e.g., Booz-Allen & Hamilton, Inc., B-275934.2, May 29, 1997, 97-1 CPD ¶ 222 at 8. Moreover, since under the RFP the technical evaluation factors were more important than price, and USC’s price was not so low as to be considered advantageous, and where two reasonably priced proposals remained in the competition, the contracting officer’s decision not to communicate with USC during the evaluation concerning the firm’s performance history was reasonable. Rohmann, supra, at 9.³

Finally, USC is not an interested party to challenge the agency’s decision to award to Dover, which submitted a technically superior, higher priced proposal. Under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not

³Although it attempted to do so, USC has failed to meaningfully distinguish the facts of this case from those in Rohmann. For example, USC persistently argues that the agency ignored positive performance information from its second reference. However, the record clearly shows that the second reference reported favorably on USC’s performance only after the award was made under this RFP.

be in line for award if the protest were sustained. 4 C.F.R. § 21.0(a) (1999). Here, since the agency reasonably eliminated USC's proposal from consideration for award, and since, in addition to Dover's proposal, the proposal of Offeror A remained eligible for award, USC is not an interested party to challenge the agency's tradeoff decision which resulted in an award to Dover because, even if its protest were sustained, Offeror A, not USC, would be in line for award. See, e.g., Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 3-4; Dick Young Prods. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336 at 8.

The protest is denied.

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